JD(SF)–33-07
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

GOOD SAMARITAN HOSPITAL

Employer

and

Allen V. Smith, an Individual **Case 31-RD-1555**

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST, LOCAL 399

Union

Marta M. Fernandez, Esq., and *Barbara Arnold, Esq.*,
Los Angeles, CA, for the Employer.
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ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

Gregory Z. Meyerson, Administrative Law Judge. Pursuant of Section 102.69 of the National Labor Relations Board's (the Board's) Rules and Regulations, the Acting Regional Director for Region 31 issued a Report on Objections, Order Directing Hearing, and Notice of Hearing on August 13, 2007, in which he ordered that a hearing be held on certain objections to conduct affecting the results of the election in the above captioned matter. Thereafter, this matter was heard by me on September 5-6 and October 2, 2007, in Los Angeles, California.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsels for all parties, and my observation of the demeanor or the witnesses, I now make the following findings, conclusions of law, and recommendations.[1]

I. Background

On August 7, 2006, Allen V. Smith (the Petitioner), filed a petition for an election in the above captioned case. Smith is an employee of Good Samaritan Hospital (the Employer). Subsequently, a Stipulated Election Agreement was executed by the parties and a secret ballot election was conducted under the direction and supervision of the Acting Regional Director on March 27 and 28, 2007, among the employees in the unit agreed appropriate.[2] This bargaining unit had for some time been represented by Service Employees International Union, United Healthcare Workers-West, Local 399 (the Union).

After the election, each party was furnished with a Tally of Ballots which showed that of the approximately 458 eligible voters, 400 cast ballots, of which 200 were cast in favor of the Union, 198 were cast against the Union, 1 ballot was void, and 2 ballots were challenged. The 2 challenged ballots were sufficient in number to affect the results of the election. Subsequently, the parties took the position that the challenge to the ballot of one of the challenged voters should be sustained. As a result, the remaining challenged ballot was no longer determinative of the results of the election. A revised Tally of Ballots issued on July 13, 2007, reflecting that a majority of the valid votes cast had been cast in favor of the Union. (See G.C. Ex. 1(a).)

On April 4, 2007, the Employer, the Union, and the Petitioner filed timely objections to conduct affecting the results of the election. The Union, with the approval of the Acting Regional Director, withdrew its objections on July 30, 2007. Subsequently, the Acting Regional Director overruled the Petitioner's objections on the basis that the Petitioner failed to timely submit evidence in support of his objections.[3]

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[1] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

[2] Included: All full-time and regular part-time and per diem non professional employees including technical and service and maintenance employees employed by the Employer at its facilities located at 637 South Lucas Avenue, 1225 Wilshire Boulevard, 1245 Wilshire Boulevard, 1350 Shatto Street, and 1254 West 6th Street, all within the City of Los Angeles, State of California. Excluded: Skilled maintenance employees, business office clericals, professional employees, registered nurses, confidential employees, guards and supervisors as defined in the Act.

[3] I hereby take administrative notice of a Decision and Order of the Board, dated September 10, 2007, in connection with the above captioned matter, wherein the Board noted that no exceptions had been filed to the Regional Director's Report. Accordingly, the Board adopted the findings and recommendations in the Report. Therefore, the Petitioner's objections are no longer pending or before me for adjudication.

Accordingly, I have before me for resolution only the Employer's objections. As set forth in his Report, the Acting Regional Director determined that theses 8 objections raised substantial and material issues of fact and law, which could best be resolved by a hearing.[4] Having conducted that hearing, during which the parties participated and presented evidence, I will in the remainder of this decision set forth my findings, conclusions, and recommendations concerning the resolution of the Employer's objections.

II. The Objections

As noted above, Smith filed a decertification petition in this case on August 7, 2006. However, due to the filing of certain unfair labor practice charges, this petition was "blocked" from further processing. Subsequently, those charges were resolved, and an election in this matter was held on March 27 and 28, 2007. The seven and a half month period between the filing of the petition and date of the election is what is commonly referred to as the "critical period." It is during this period that the Board will generally consider improper conduct as objectionable. All eight of the Employer's objections allegedly occurred during the critical period.

Before beginning to review the objections, it is necessary to reiterate that as set forth in the revised Tally of Ballots, approximately 400 eligible voters cast ballots in the election, of which 198 were cast against the Union and 200 of which were cast in favor of the Union. Challenged ballots were not determinative. In essence, the election majority on behalf of the Union was a difference of two votes. The closeness of the election is an important factor as the Board has held that in a close election the objectionable conduct need not be as severe or have affected as many employees in order to warrant setting aside the election. The narrowness of the vote in an election is a relevant consideration. *Robert Orr-Sysco Food Services,* 338 NLRB 614 (2002); *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995); Also see *Avis Rent-a-Car,* 280 NLRB 580, 581 (1986).

Further, the Board has repeatedly indicated that in deciding whether employees could freely and fairly exercise their choice in an election, it will evaluate the following nine (9) factors: (1) the number of the incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party prevailing in the election. *Avis Rent-a-Car, supra;* See *Chicago Metallic Corp.,* 273 NLRB 1677, 1704 (1985); Also see *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *YKK (USA) Inc.,* 269 NLRB 82, 83-84 (1984).

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[4]The Employer attempted to raise an unnumbered "9th" objection concerning the ballot of employee Keith Jacobs. However, on April 24, 2007, the Acting Regional Director had issued an Order Denying Motions to Consider Keith Jacobs' Challenged Ballot as a Determinative Challenged Ballot. The Employer and the Petitioner filed Requests for Review in response to the Order denying the aforementioned motions. On July 11, 2007 the Board denied the Requests for Review. (See G.C. Ex. 1(a).) Accordingly, this "9th" objection has been fully adjudicated and is no longer pending or before me for resolution.

As the Board stated in the seminal case of *General Shoe Corp,* 77 NLRB 124 (1948), and in many cases since, "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." This is the Board's ultimate objective in conducting elections, and the issue before me is whether the Union's conduct as alleged in the Employer's eight objections interfered with those "laboratory conditions."

A. Objection No. 1- Violation of the Collective Bargaining Agreement

As set forth in the Report on Objections, objection number 1 alleges that, "… the Union through its agents, repeatedly and flagrantly violated the terms of the collective bargaining agreement's access clause, a course of conduct calculated to erode support of decertification among unit employees."

The most recent collective bargaining agreement between the Employer and the Union was effective from December 1, 2003 through November 30, 2006. (Emp. Ex. 1.) The parties have continued to honor its terms and conditions as they have negotiated over a successor agreement. Article IX is the union access clause. It provides in relevant part that in order to obtain access, a union representative must advise the Employer's human resources department 12 hours in advance of the visit as to which departments or areas the visit will involve; must confine the visit to those areas; can confer with the employees only on the employees' non-working time and in non-patient care areas, such as cafeteria or break rooms; and only when the union representative does not interfere with the work of employees or the confidentiality of patients.

It is undisputed that with the filing of the decertification petition, the Union greatly increased its presence at the Hospital. The union business agents responsible for contacting the employees, processing grievances, and organizing support for the Union in the election were principally David Ronquillo (Ronquillo), Claudia Rodriguez (Rodriguez), and Keisha Stewart (Stewart). In an apparent effort to accommodate the increased frequency with which the union agents sought access to the Hospital, Diana Scribner (Scribner), the Employer's director of human resources, issued a memo on September 29, 2006, to numerous managers. In pertinent part the memo read as follow: "Until such times as contracts have been renegotiated [various union officials including the three mentioned above] have been authorized access to our employee break rooms and/or our cafeteria for purposes of meeting with SEIU member employees. Per the Collective Bargaining Agreement, they are not to disrupt employees while on working time. Access is approved ongoing until such time [as] a new contract is ratified if not decertified by then." (Emp. Ex. 3.)

During the critical period, there were certainly a number of disputes between various managers and union business agents regarding access to the Hospital. Some of these disputes were highly confrontational and the allegation that they constituted harassment of supervisors by union agents will be discussed under a different objection. However, under objection number 1, it is the Employer's contention that the Union repeatedly violated the access clause of the collective bargaining agreement, and that such violations of the contract constituted objectionable conduct. The Employer offered evidence intending to establish that the Union violated the access clause in the contract in at least the following instances: September 28, 2006, when Ronquillo confronted Barbara Ceazan (Ceazan), the director of the emergency department, seeking immediate access to the emergency department; March 14, 2007, when Rodriguez, Stewart, and Michelle Collins (Collins), union steward, confronted Elizabeth Maister, manager of the labor and delivery department, seeking immediate access to the department; and that on other numerous occasions the union agents repeatedly approached and "harassed"

employees while they were working in patient care areas or while they were with a patient, for example, the incident of March 24, 2007, when Rodriguez confronted the Petitioner (Smith) while he was assisting a patient.[5]

The Union and the Employer strongly disagree as to whether the Union's actions in accessing the bargaining unit employees constituted a breach of the collective bargaining agreement. However, I am of the view that it is unnecessary to resolve this dispute because, even assuming for the sake of argument that the Union's actions did constitute such a breach, such actions do not constitute objectionable conduct.

At the hearing, counsel for the Employer initially took the position that a violation of a collective bargaining agreement (CBA) is *per se* objectionable conduct. However, apparently unable to support that position with case authority, counsel acknowledged in her post-hearing brief that a violation of a CBA during the critical period is not *per se* objectionable conduct. Counsel attempts to distinguish the facts in this case by arguing that the Union's conduct was objectionable because "it conveyed the impression to Hospital employees that the Hospital was not in control of its facilities."

Counsel for the Employer would have the undersigned believe that the Hospital was under siege and that the Union's actions communicated to employees that the Hospital was "powerless to protect its own legal rights in a confrontation with the Union." To that end, counsel cites *Phillips Chrysler Plymouth,* 304 NLRB 16 (1991). However, I am of the opinion that *Phillips* is inapposite. In *Phillips*, union organizers basically took over the employer's shop area prior to the pre-election conference on the day of the election. They engaged in a "shouting match" in front of eligible voters, and refused to leave the facility until the police forced them to do so. In the matter at hand, there were no events even remotely comparable to such a scenario. Also, counsel's argument that the cumulative effect of the Union's breach of the CBA rose to such a level, falls short. Even assuming that the Union frequently ignored the limiting aspects of the access provision in the CBA, there is no credible, probative evidence that employees were of the belief that the Employer had lost control of its facility.

In the matter before me, there is an absence of the sort of extraordinary evidence as might establish that a breach of the access provision in the collective bargaining agreement also constituted objectionable conduct. It is axiomatic that the burden of proof rests with the party alleging objectionable conduct. Regarding this objection, the Employer has failed to meet its burden. Accordingly, I recommend that objection number 1 be overruled.

B. Objection No. 2- Threatening, Coercive, and Intimidating Conduct

In the Report on Objections, objection number 2 alleges that, "During the Critical Period, the Union threatened, coerced and intimidated employees because of their lack of support for the Union, a course of conduct calculated to erode support of decertification among unit employees."

Testimony was offered by several witnesses regarding the conduct of union business agent Ronquillo. This evidence was unrebutted. Ronquillo was employed by the Union and active in the early stages of the Union's campaign to win the election. However, at some point he was removed from the campaign, and apparently is no longer an employee of the Union. He

[5] It is undisputed that the labor and delivery department and the emergency department are "locked departments" where access is restricted to those with a "badge."

did not testify, and the Union did not offer any explanation for his failure to do so. Accordingly, I shall accept as credible the testimony of those witnesses who alleged improper conduct on the part of Ronquillo.

The Petitioner (Smith) testified that at the end of September 2006, in the presence of additional bargaining unit employees, in the hallway outside of the nurses' station, on the fourth floor of the Hospital, he was approached by Ronquillo who said, "You're the enemy. You're destroying what we're doing here." According to Smith, "Ronquillo was gesturing angrily with fists clenched," raised his voice, and got into a "combative posture" approximately six inches from Smith's face. Smith acknowledged putting his fists up too, "in a defensive stance." The two men were then separated by a certified nursing assistant, a member of the bargaining unit, and Smith walked away from Ronquillo in an effort to avoid a "fistfight at work." This occurred in the presence of five or six employees, some of whom were also members of the bargaining unit.

Ronquillo was involved in a similar incident on September 28, 2006, with Barbara Ceazan, the director of the emergency department, in the presence of bargaining unit employees, patients, and visitors in the waiting room outside the department. Cynthia Cabera, emergency room associate, and a member of the bargaining unit, testified that she observed this confrontation. According to the testimony of Ceazan, Ronquillo was "almost screaming" at her, demanding access to the department. He was "surly," "obnoxious," and "boisterous." In order to diffuse the situation, she allowed him into the emergency department, but because she was worried about his demeanor, Ceazan watched as a charge nurse led Ronquillo toward the employee lounge. She observed Ronquillo "loudly" inform the charge nurse that he was not going to talk to or listen to what she had to say.

Another agent of the Union, whose conduct was placed in question by witnesses, and who failed to testify in rebuttal, was Michelle Collins, the union steward. As with Ronquillo, the Union offered no reason for her failure to testify. No evidence was offered to suggest that she was either no longer employed by the Hospital or no longer the union steward. In any event, the testimony of Marcos Morgana concerning Collins' actions remains unrebutted and is, therefore, credited. Morgana is a radiology technician and member of the bargaining unit. About one month prior to the election, he was approached by Collins while working in the department. In response to a question from Collins, Morgana indicated that he would not be supporting the Union. At that point, Collins got very loud and began to refer to Morgana as a "traitor." He was concerned with their conversation being overheard by other employees as well as patients, and so closed the door to the x-ray room in which they were conversing.

It is the Employer's position that the oral and physical threats made by Ronquillo toward Smith, as well as the oral harassment by Ronquillo toward Ceazan, and the oral harassment by Collins toward Morgana, all in the presence of bargaining unit members, constitutes objectionable conduct. In support of that proposition, counsel for the Employer cites *Crown Coach Corp.,* 284 NLRB 1010 (1987); and *Cedars-Sinai Medical Center,* 342 NLRB 596 (2004). Both cases are correctly cited for the proposition that under certain circumstances (considering the nature of the conduct, how often it occurred, how widely disseminated it was, whether unit employees were genuinely fearful, and the temporal closeness of the conduct to the election), harassment and threats may require setting aside an election.

I am of the view that the incident between Ronquillo and Smith, which occurred in late September of 2006, was very significant. Smith was, of course, the Petitioner. He was the most active bargaining unit member attempting to have the Union decertified. He was viewed as the leader of this effort, and his support for the decertification was likely critical to what ever success it might have. It was in this context that union business agent Ronquillo sought out

Smith, and in the presence of other bargaining unit employees, addressed him as "the enemy," who was destroying the Union's achievements. Further, Ronquillo assumed a combative posture with his fists clenched, standing only 6 inches from Smith. Apparently, only the separation of the two men by a bargaining unit employee prevented a fist fight from occurring.

Ronquillo was obviously trying to instigate a physical altercation with Smith. This action, taken by a union agent against the Petitioner in the presence of other bargaining unit employees, would clearly have had a significant impact on other unit employees. Others would likely assume that if a union agent was bold enough to verbally and physically attack the principal sponsor of the decertification, that the Union would not hesitate to seek to harm others less prominent who also opposed the Union.

The only factor lessening the impact of this incident was its remoteness from the election date, having occurred approximately six months prior to the election. However, there were other such incidents, specifically the arguments between Ronquillo and Ceazan and between Collins and Morgana, certainly less serious, but significant never-the-less, which would serve to remind employees of the Union's expressed threat to harm Smith. It is also significant to note that the Collins/Morgana incident occurred within one month of the election.

I think it likely that the altercation between Ronquillo and Smith was widely disseminated, had the potential to be long lasting, and to affect a significant number of bargaining unit employees. Accordingly, I conclude that objection number 2 has merit, and recommend that it be sustained.

C. Objection No. 3- Bribery and Coercion of the Petitioner

As set forth in the Report on Objections, the Employer alleges in objection number 3 that on about March 16, 2007, union representative Claudia Rodriguez "attempted to bribe and coerce the Petitioner into withdrawing his support for decertification by offering Petitioner a job with SEIU, a place on the SEIU bargaining committee and other valuable benefits and incentives."

Alan Smith, the Petitioner, testified at length at the hearing. Preliminarily, I will note that I found Smith to be a highly credible witness. He impressed me with his intelligence and sincerity. He is obviously articulate, and his calm demeanor demonstrated why he is viewed as a leader by those who support the decertification effort. He is not unbiased, as he clearly supports and initiated the decertification effort. Never-the-less, I am of the opinion that his testimony was highly truthful. He had a good memory for details, and I did not get the impression that he was either exaggerating or embellishing his testimony. While he unmistakably serves as a spokesperson for his cause, I was left with the perception that his personal sense of morality would not permit him to engage in any outright fabrication.

Unfortunately, I did not get the same sense of truthfulness when hearing the testimony of union business agent Claudia Rodriguez. She was highly agitated, hostile, and defensive when testifying, especially under cross-examination by counsels for the Petitioner and Employer. Further, she employed selective memory when testifying. While she seemed capable of recalling those details that supported her version of events, her memory apparently failed when responding to questions, the answers to which would likely not favor her. Rodriguez' testimony was replete with the answer of "I do not recall" when being cross-examined. As a paid union employee, she was as equally partisan as was Smith, in her case seeking to achieve a victory

for the Union in the election. However, unlike Smith, I had the impression that she would alter her testimony as necessary in order to achieve her goals. Therefore, where the testimony of Smith and Rodriguez was at variance, which it frequently was, I credited Smith's version of events.

Smith, who is a certified occupational therapist assistant, testified that about March 16, 2007, he was in the front of the Hospital on its circular driveway working with a patient in a wheelchair when he was approached by Rodriguez. She asked him to withdraw his support for the decertification effort and to decline to be an observer in the election that was to be held approximately 11 days later. Further, according to Smith, Rodriguez said that the Union had "a job for [him] after this whole thing is over…." She offered him "purple scrubs,"[6] and a place as a "keynote speaker" in the upcoming rally on behalf of the Union featuring the Reverend Jesse Jackson.[7] According to Smith, he "chuckled" at the offer, and then said that he wasn't interested. Smith testified that the conversation lasted no more than five minutes, and that only he, Rodriguez, and the patient were present.

Rodriguez' testimony was confusing and inconsistent at best. Under direct examination by union counsel, she specifically denied having any such conversation with Smith, denied offering him a job, denied offering him purple scrubs, denied offering him a place as a keynote speaker at the rally, and denied offering him anything of value in return for Smith's abandoning the decertification effort. However, when questioned on cross-examination, she could not recall whether she had ever had a conversation with Smith in the circular driveway when he was with a wheelchair patient, could not recall whether she had offered him a position on the podium with Jesse Jackson, and could not recall whether she had offered him purple scrubs.

As noted, and for the reasons given above, I conclude that Rodriguez, on behalf of the Union,[8] did in fact offer Smith a job with the Union, purple scrubs, and the opportunity to be a keynote speaker at the Jesse Jackson rally if he would abandon the decertification effort. Further supporting Smith's version of these events, was his action in quickly informing the members of the bargaining unit of Rodriguez' offer to him. Smith and his election committee prepared a letter dated March 22, 2007, in which he mentioned that the Union had tried to "bribe" him by offering him a job with the Union if he would end his decertification efforts. This letter, signed by Smith, was mailed to the great majority of bargaining unit members and was also posted in break rooms where employees congregated. (Emp. Ex. 9.)

The subsequent action by Rodriguez, after she learned that Smith had notified the bargaining unit members of her offers to him, further establishes the veracity of Smith's testimony that such offers were in fact made to him. Rodriguez' subsequent emotional outburst

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[6] Purple was the Union's chosen color, and the wearing of purple medical scrubs was intended as a show of support for the Union.

[7] On March 19, 2007, a rally was held at the Hospital on behalf of the Union and its employee supporters. The featured speaker was the Reverend Jesse Jackson. The rally was advertised in flyers since at least March 14, 2007. (Emp. Ex. 7.)

[8] While Rodriguez testified that she had no authority to offer a job with the Union to anyone, I conclude that even if she did not have the actual authority to make job offers on behalf of the Union, she certainly had apparent authority to do so. She was a representative of the Union, and recognized as such by the bargaining unit members. It would certainly not have been unreasonable for employees to assume that she had the authority to make the kind of offers she made to Smith, in return for his agreement to abandon the decertification effort. See *IBEW Local 98 (MCF Servs. Inc.),* 342 NLRB 740 (2004), citing *Restatement 2nd, Agency, Sec. 27.*

and confrontation with Smith after learning of the March 22, 2007, letter to employees is the subject of the next objection and will be covered in detail at that point in this decision. For the present, it is merely necessary to note, that in my view, Rodriguez would not have acted in such an aggressive manner had there not been at least a significant amount of truth in the claims that Smith was making in the letter.

I have conclude that on about March 16, 2007, Rodriguez did in fact offer Smith items of considerable value, in particular the possibility of a job with the Union, if he would abandon the decertification effort. Further, this offer was very widely disseminated among the bargaining unit members by means of Smith's letter of March 22, 2007, mailed to them, as well as posted in various employee break rooms at the hospital.

The Board has consistently held that a union's offer of benefits to eligible voters during an election campaign is objectionable and is grounds for setting aside an election. *Alyeska Pipeline Service Co.,* 261 NLRB 125 (1982) (employees promised favorable priority positions for high paying construction jobs in Alaska); *Crestwood Manor,* 234 NLRB 1097 (1978) (a promise of a $100 raffle). In *Alyeska,* the Board ordered a new election, concluding that the statements by union agents that union members would be in a favorable position for obtaining high paying construction jobs through priority hiring hall referrals constituted unlawful promises of benefit and interfered with the employees' freedom of choice in the election. *Id.* at 127. The Board relied on the fact that the union, the party making the promise of benefit, had the power to effectuate the promise. Regarding dissemination of such promises, the Board has held that even where the promise is made to only one employee, where the information is disseminated to a determinative number of unit employees, the setting aside of the election is required. See *Cedars-Sinai Medical Center,* 342 NLRB 596, 598 (2004).

In the matter before me, Rodriguez could reasonably be assumed to have the authority to follow through on her offer made to Smith to provide him with a job with the Union if he abandoned his support for the decertification effort. The promise of a job is clearly the promise of a significant financial benefit. Although the promise was only made to Smith, he was the most prominent decertification supporter, and so the promise and his reaction to it would likely be of interest to a significant number of other opponents of the Union. Further, the information was very widely disseminated to virtually all the members of the bargaining unit. This was of particular practical significance in an election that was ultimately decided by only two votes.

Virtually every bargaining unit member was placed on notice of the potential for financial benefits in exchange for supporting the Union. In this way, the voters were coerced into supporting the Union, which coercion interfered with their freedom of choice in the election. Accordingly, I conclude that objection number 3 has merit, and recommend that it be sustained.

D. Objection No. 4- Intimidation and Coercion of the Petitioner

The Employer alleges in objection number 4 that on March 24, 2007, union agents Rodriguez and Stewart "intimidated and coerced" bargaining unit employees "by verbally attacking Petitioner in front of a patient and the patient's visitor…."

Following the issuance by Smith of his letter of March 22, 2007, in which he accuses the Union of tying to "bribe" him (Emp. Ex. 9.), there occurred a confrontation between Smith and Rodriguez, witnessed by Keisha Stewart. Not surprisingly, Smith and Rodriguez testified as to very different versions of what occurred. For the reasons that I expressed earlier, I continue to find Smith credible and Rodriguez not so. Additionally, the story told by Smith is inherently much more plausible than that told by Rodriguez. Further, Smith's version is supported by the

testimony of Sister Maria Socorro, a totally neutral individual who was at the time of the event in question visiting a patient whom Smith was treating. Keisha Stewart, on the other hand, was a highly partisan union business agent, called as a witness on behalf of the Union, whose testimony, not surprisingly, supports Rodriguez' version of events.

I found Stewart as incredible as Rodriguez. Both Sister Maria Socorro and the patient she was visiting are members of the Roman Catholic Order of Servants of Mary, whose mission it is to minister to the sick and injured. There is no serious dispute that at the time of the incident in question, Sister Maria Socorro was dressed in full religious regalia, which are accurately characterized in the brief from counsel for the Petitioner as "flowing white robes." Sister Maria Socorro testified at the hearing in her nun's habit, and the undersigned is in accord with counsel's description. Certainly to have seen the Sister testify in her habit, the undersigned would not likely forget what she wore. However, astonishingly, Stewart testified that at the time of the incident she noticed someone standing beside the patient in the wheelchair that Smith was caring for, but she did not recall what that person looked like, and did not recall whether that person was a nun. This incredible testimony, plus Stewart's support of Rodriguez' inherently implausible story, leads me to conclude that Stewart is no more credible than Rodriguez. Therefore, I continue to credit Smith's version of these events.

According to Smith, three days before the election, he was pushing a wheelchair bound patient to the elevators on the sixth floor of the Hospital accompanied by her visitor when Rodriguez started yelling at him from a break room to "come here." Not wanting to engage her in conversation, Smith continued on his way. However, Rodriguez "chased" after him down the hall. She caught up with him in front of the elevator. Stewart was apparently close behind her. Smith testified that Rodriguez was screaming and yelling at him, "How dare you. How dare you put my name on that flyer? What do you think you're doing?" Smith merely responded that he was with a patient and they could talk about it later. He testified that Rodriguez blocked his movement toward the elevator and he missed the first one. About 25 seconds later, he was able to back into a second elevator that came along and went on his way with his patient.

Rodriguez' version of these events was totally unbelievable. She testified that employees in a break room with whom she was speaking were upset with the fact that Smith had sent the March 22, 2007, letter to their homes. She allegedly tried to calm them down when coincidentally she observed Smith walk by with a patient in a wheelchair. According to Rodriguez, she passed Smith near the elevators and only made one comment to him, namely, "What you wrote on that flyer is not true." She contends the conversation only lasted "seconds," and denied that she blocked him from the elevator or that she was screaming at him.

Unfortunately for Rodriguez, her testimony is not supported by Sister Socorro. The Sister can not recall the words spoken by the woman who approached Smith, but she remembered the woman's tone of voice as "angry" and "raised," and the woman's words as intending to "kind of humiliate him [Smith]." According to the Sister, Smith merely acted "very humbled" and did not answer back. She estimated that the conversation lasted "no more than five minutes." After they got into the elevator, Smith was very calm and apologized to the two Sisters for the incident.

As I have noted, I credit Smith's version of the incident with Rodriguez in front of the elevators. Never-the-less, I do not believe that this incident rises to the level of objectionable conduct. There is no question that this incident was widely disseminated among bargaining unit employees. Smith prepared and signed a flyer entitled "SEIU REP'S VERBALLY ATTACK ME IN FRONT OF MY PATIENT!" (Emp. Ex. 12.) He and his election committee distributed the flyer around the Hospital in places where the unit employees were known to congregate. As the

incident occurred on March 24, 2007, with the election beginning three days later, the flyer was obviously distributed shortly before the election. Clearly, Smith hoped that the information in the flyer would influence voters to support the decertification.

However, based on the content of the words spoken at the incident, the context in which they were spoken, and the flyer explaining it, I do not believe it constituted intimidation or coercion of the bargaining unit members, such that there was interference with their freedom of choice in the election. It can reasonably be concluded that Rodriguez' actions and statements towards Smith in the presence of patients and guests of the Hospital were rude, boorish, and unprofessional, but not coercive. Certainly not every argument or confrontation between a union official and a decertification supporter rises to the level of intimidation or coercion. Representation elections tend to be hotly contested. People may well have strongly held opposing views, which may result in verbal disagreements. That is precisely what occurred between Rodriguez and Smith. However, the Board is not in the habit of acting as a referee in such arguments. Voters are intelligent enough of figure out for themselves that such a verbal confrontation is merely part of the emotional atmosphere sounding an election campaign, and is not intended to frighten or intimidate voters.

Regarding this objection, I am of the view that Rodriguez' words and conduct did not serve to intimidate or coerce members of the bargaining unit. The incident did not reasonably interfere with the employees' freedom of choice in the election. Accordingly, I recommend that objection number 4 be overruled.

E. Objection No. 5- The Campaign Bus

It is alleged by the Employer in objection number 5 that the Union "intentionally disrupted Hospital operations and intimidated employees by blocking ingress and egress from the Hospital by parking their purple campaign bus in front of Hospital access points during a union rally."

As noted earlier, on March 19, 2006, there was a rally at the Hospital sponsored by the Union at which there were a number of dignitaries and speakers, including the Reverend Jesse Jackson. (Emp. Ex. 7.) Several witnesses testified that a crowd gathered to hear the speakers, with the number of spectators estimated at between 40 and 50 individuals. The rally took place in the vicinity of the circular driveway in front of the Hospital, with Jesse Jackson and his entourage at one point moving to the Hospital cafeteria. The rally began at approximately 12 noon and last for about one hour. Besides union supporters, there were a number of Hospital management officials in attendance, including Diana Scribner, the director of human resources. Alan Smith, the Petitioner, was also present.

Several witnesses referenced a purple "bus" or "recreational vehicle" (RV) that the Union used for transportation and advertising purposes. There is no dispute that the "bus" was parked in the vicinity of the Hospital during the rally. However, no witness testified that this "bus" was parked in such a fashion that ingress or egress to the Hospital was impeded in any way. There was a cryptic reference to the "bus" being ticketed, but no witness knowledgeably testified as to specifically why the alleged ticket was issued, or whether a law enforcement entity, and if so, which one, issued the alleged ticket. While Scribner testified that she saw a ticket on the "bus" and that it was from the City of Los Angeles, issued for illegal parking, counsel neglected to ask her how she knew such a thing. Under these circumstances, I do not consider Scribner's testimony on this issue probative.

The Employer has totally failed to meet its burden of proof and establish by any measure of evidence that at the time of the Jesse Jackson rally there was any blocking of ingress or egress to the Hospital by agents or supporters of the Union. Specifically, the Employer has failed to show that the Union's "bus" was parked in such as fashion as to interfere in the slightest with the operation of the Hospital. Correspondingly, the Employer has failed to demonstrate that potential voters were intimidated by the Union's actions in connection with the "bus" or impeding access to the Hospital during the rally. Accordingly, I conclude that objection number 5 is without merit, and I recommend that it be overruled.

F. Objection No. 6- Picket Signs

The Employer alleges in objection number 6 that during the Jesse Jackson rally, "Union representatives engaged in picketing, held picket signs and banners in support of the Union," and that prior to the picketing "the Union failed to provide the Hospital with the ten day's notice required for picketing pursuant to Article 11, Section 2 of the Collective Bargaining Agreement and as required by the NLRA Section 8(g)."

Scribner testified that during the rally she observes three persons with picket signs. After the rally was over, she overheard a conversation between two of the "pickets" and an unidentified man discussing what to do with the signs. According to Scribner, the unidentified man told the "pickets" to place the signs in the back of the purple union "bus," which the "pickets" allegedly did. This is a rather cryptic, mysterious conversation, which appears out of context, allegedly overheard by Scribner. While I have generally found Scribner to be credible, I do question the accuracy of what she overheard. In any event, I need not further analyze this testimony, as the Union has acknowledged the presence of several persons holding signs at the rally.

Although I earlier found the testimony of Keisha Stewart not credible when she disputed the testimony of Alan Smith, in the context of the events at the union rally it was inherently plausible. This aspect of her testimony had "the ring of authenticity" to it, and I credit her. According to Stewart, the Union uses professionally printed signs when picket signs are utilized at a demonstration. She testified that the Union did not authorize the use of picket signs at the rally. However, she testified that during the rally she observed two individuals, whom she did not know, holding signs on sticks. She approached the two individuals, told them "to put the signs away, because this was not a picket." Further, she asked them who they were and where they were from. According to Stewart, they said they worked at a nursing home in Long Beach and came to the rally to support the workers. They refused her request that they sign an attendance sheet, and acted as if they could not speak English. Stewart contends that the signs were not authorized or provided by the Union and that the Union is unaware as to the identities of these individuals. She alleges that the union officials at the rally initially removed the sticks from the signs and then took the signs away from the individuals holding them.

The Jesse Jackson rally was heavily advertised with flyers (Emp. Ex. 7.) and by other means, and apparently was open to the general public. Considering Jesse Jackson's celebrity and popularity, it would certainly not be surprising for persons not directly affiliated with the Union or the Hospital to attend the rally. Why any such individuals would appear holding picket like signs with the name of the Union written on them, as testified to by Scribner, is unclear. However, I credit Stewart's testimony that these were not union "pickets," were not carrying authorized union picket signs, the individuals were unknown to the Union, and their actions were in no way sanctioned or authorized by the Union.

The burden of proof to support the objections remains with the Employer. As to this objection, the Employer has failed to meet its burden. The evidence offered by the Employer is insufficient to establish that the individuals observed by Scribner holding picket like signs were agents of the Union, either actual or apparent, or even union members. Their identity is simply unknown. There is no probative evidence that the Union in any way sanctioned, approved, or adopted the actions of these "pickets." To the contrary, Stewart credible testified that she questioned these individuals regarding their identity, and that, ultimately, representatives of the Union confiscated their signs.

There is insufficient evidence to establish that the appearance of individuals holding picket like signs at the rally was either a violation of the Act, a breach of the collective bargaining agreement, or objectionable conduct.[9] Accordingly, I conclude that objection number 6 is without merit, and I recommend that it be overruled.

G. Objection No. 7- Electioneering

It is alleged by the Employer in objection number 7 that during the election on March 28, 2007, at 1:15 p.m., "Union Representative Claudia Rodriguez passed out union campaign flyers to employees as they went to vote, in violation of the prohibition against electioneering at the polls."

The election took place on March 27 and 28, 2007, in the Grace Ford Salvatori Auditorium (the Auditorium), located on Hospital property on Lucas Street, across from a parking lot that was designated for voting employees' parking. Lucas is a small street and there is a crosswalk on the street between the parking lot and the Auditorium. There was a pre-election conference held at the election site, which was attended by the Board agent conducting the election, as well as representatives of the Petitioner, Employer, and Union. It is undisputed that at the conference the parties agreed and the Board agent directed that there should be no electioneering[10] in front of, or in the vicinity of, the Auditorium while the election was in progress.

Michael Muth (Muth), the director of pulmonary neurology at the Hospital, testified on behalf of the Employer. According to Muth, on March 28, 2007, the second day of the election, at approximately 1:15 in the afternoon, he observed Claudia Rodriguez passing out flyers outside the Auditorium. He testified that at the time he was going to lunch and observed Rodriguez some distance away from him, directly in front of the Auditorium, standing both on the curb and in the crosswalk, passing out flyers to employees arriving to vote. (Emp. Ex. 13.) He claims to have watched Rodriguez for "a couple of minutes" as she passed out flyers. However, it is significant to note that Muth testified that he did not actually see what was on the pieces of paper that Rodriguez passed out. He merely assumed that it was some type of pro-union campaign flyer, such as the Union had used at other locations.

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[9] It is significant to note that the Employer apparently never filed either an unfair labor practice charge or a grievance under the terms of the collective bargaining agreement alleging the impropriety of the so called "picketing."

[10] While Claudia Rodriguez testified that she did not recall the word "electioneering" being used at the pre-election conference, she acknowledged that the parties agreed there would be no campaigning around the Auditorium while employees were voting.

Rodriguez testified that she did not pass out flyers on the second day of the election. She denied spending any time walking in and around the crosswalk on Lucas Street during the time the election polls were open. She knew from the pre-election conference and from discussing the matter with other union representatives that she was not to pass out any literature or be in the vicinity of the Auditorium while the election was in progress. The closest to the Auditorium that Rodriguez admitting being during the election was when she walked to the "Pink Palace," an apartment building on Hospital property, as she accompanied several employees. This building is near the Hospital emergency room. It is apparently in the general vicinity of the Auditorium, but it is unclear to the undersigned as to precisely how close.

Once again it is important to reiterate that the burden of proof rests with the Employer to support its objections. In this instance, the only evidence offered by the Employer was Muth's testimony. He had testified that when he observed Rodriguez allegedly passing out flyers, he was in the company of two other Hospital managers. Oddly, the Employer did not call either of these managers to testify. Even stranger, the Employer failed to call a single employee witness to testify that he/she received a flyer or other piece of literature from Rodriguez in front of the Auditorium during the election. Not a single witness was called to corroborate Muth's testimony that Rodriguez was present, let alone passing out flyers, in front of the Auditorium during the election.

For the reasons that I noted earlier, I did not find Rodriguez to generally be a credible witness. Never-the-less, in this instance I credit her denial that she was in front of the Auditorium or was passing out flyers in that vicinity during the election. Rodriguez knew that such conduct was prohibited and she is certainly intelligent enough to understand the high likelihood of being caught in such conduct during the middle of the day. She was an experienced union representative, who I believe was unlikely to engage in such obviously risky conduct.

On the other hand, I did not find Muth's version of these events credible. He testified in such a way as to seem amused by the alleged incident. He was very defensive when questioned about the specifics of the alleged incident. While he was insistent that Rodriguez was passing out flyers, he was forced to acknowledge that he did not actually see the papers she was allegedly passing out and could not say what, if anything, was contained on them. I find his entire story, including his presence in the area of the Auditorium, to be highly suspect. This was even more so considering the Employer's failure to call to testify the other two managers who were allegedly with him or, for that matter, any other witness to the alleged event.

Muth, a Hospital manager, was clearly not a neutral witness. Further, his testimony left me with the impression that he was highly partisan, and may have manufactured the entire alleged event. In light of the failure on the part of the Employer to complain to the Board agent conducting the election immediately following the voting, I am of the view that Muth has likely continued to exaggerate and embellish his tale as time has passed.[11]

[11] Muth apparently reported the alleged incident to Scribner in human resources. However, I do not find an incident report made to a fellow Hospital manager to have the same significance as a report not being made to the Board agent conducting the election. Surely had the electioneering incident actually occurred, the Employer's representatives were astute enough to have complained to the Board agent immediately following the voting. Apparently no such complaint was made.

Based on the above, I conclude that it is unlikely that Rodriguez engaged in electioneering at the Auditorium during the election as alleged in objection number 7. Accordingly, there is insufficient evidence to support this objection, and I recommend that it be overruled.

H. Objection No. 8- Removal of Hospital Flyers and Leaflets

The Employer contends in objection number 8 that Keisha Stewart "removed Hospital flyers and leaflets from bulletin boards and magazine racks and replaced them with flyers in support of the Union."

The undersigned is aware of no evidence offered by the Employer in support of this objection. Keisha Stewart was present throughout the hearing, yet was never questioned by counsel for the Employer regarding this alleged incident. While she was called as a witness for the Union, the Employer never sought to call her as its own witness, or to question her about this matter. There was simply no testimony from any witness, or any evidence of any kind, that either Stewart or anyone else removed Hospital flyers from bulletin boards and magazine racks and/or replaced them with pro-Union literature.

As the Employer has offered no evidence in support objection number 8, I must conclude that it is without merit. Accordingly, I shall recommend that this objection be overruled.

III. Conclusions and Recommendations

For the reasons that I expressed above, I have recommended that objection numbers 2 and 3 be sustained. Objection number 2 involved principally the incident occurring at the end of September 2006, wherein union business agent Ronquillo verbally and physically threatened the Petitioner, Alan Smith, in the presence of a number of bargaining unit employees. Objection number 3 involved the incident on March 16, 2007, wherein union business agent Rodriguez offered Smith a number of benefits for abandoning his support for the decertification effort, including purple scrubs, a position as a keynote speaker at the Jesse Jackson rally, and most significantly, a job with the Union. This attempt to "bribe" Smith was subsequently widely disseminated among the bargaining unit employees when Smith and his election committee mailed a letter dated March 22, 2007, containing the substance of this incident to the homes of approximately 400 members of the bargaining unit.

In deciding whether the employees in the bargaining unit were able to freely and fairly exercise their choice in the election, I am guided by Board precedent contained in numerous cases where the Board has established a number of factors to be evaluated. *Avis Rent-a-Car,* 280 NLRB 580, 581 (1986)*; Chicago Metallic Corp.,* 273 NLRB 1677, 1704 (1985). Regarding those factors, several are of particular importance in considering those objections before me that I have determined have merit. This was an extremely close election, decided by two votes out of approximately 400 cast. The Board has held that in a close election the objectionable conduct need not be as severe or have affected as many employees in order to warrant setting aside the election. The narrowness of the vote in an election is a relevant consideration. *Robert Orr-Sysco Food Services,* 338 NLRB 614 (2002); *Cambridge Tool & Mfg. Co.,* 316 NLDRB 716 (1995); *Also see Avis Rent-a-Car, supra.*

The incident in which Ronquillo made oral and physical threats toward Smith involves a number of these applicable factors. Ronquillo was trying to instigate a physical altercation with Smith, the leader of the decertification effort. Such conduct in the presence of other bargaining

unit employees would likely have a significant impact on many potential voters. Undoubtedly, the incident was widely disseminated. Although it occurred in September, some six months prior to the election, there were other such incidents, specifically the arguments between Ronquillo and Ceazan and between Collins and Morgana, certainly less serious, but significant never-the-less, which would serve to remind employees of the Union's expressed threat to harm Smith. After all, the Collins/Morgana incident occurred within one month of the election. As I indicated at length earlier in this decision, I view the altercation between Ronquillo and Smith as having the potential to be long lasting and to affect a significant number of bargaining unit members. *Crown Coach Corp.,* 284 NLRB 1010 (1987); and *Cedars-Sinai Medical Center,* 342 NLRB 596 (2004).

Similarly, the attempt by Rodriquez to get Smith to abandon the decertification effort in return for receiving something of value, principally the financial inducement of a job with the Union, would likely have influenced a significant number of voters. The incident was widely disseminated through Smith's letter mailed to the homes of a great majority of the bargaining unit member. This incident also occurred in close proximity to the election, less than two weeks prior to the vote, with Smith's letter to employees received only days before the vote, and would have reasonably still been in the minds of the voters when casting their ballots. *Alyeska Pipeline Service Co.,* 261 NLRB 125 (1982); *Crestwood Manor,* 234 NLRB 1097 (1978); *Cedar-Sinai Medical Center, supra,* at 598.

In my view, the Union's objectionable conduct reasonably could have prevented the employees from freely and fairly exercising their choice in the election. The incident where Ronquillo orally and physically threatened Smith was significant and likely made certain of those employees fearful of opposing the Union. The incident where Rodriguez offered Smith a job with the Union in exchange for abandoning the decertification effort would likely have made certain voters also consider abandoning the decertification effort and, thus, coerced them in their exercise of freedom of choice in the election. These incidents were severe, their existence was widely disseminated, would likely have remained in the minds of the potential voters, and in an election as close as this one, could certainly have determined the outcome.

In sum, for all the foregoing reasons, I conclude that the objectionable conduct by the Union has tended to interfere with the free choice of a determinative number of unit employees. Accordingly, as the election results do not reflect the employees' free choice, I recommend that the election be set aside, and a second election be directed.[12]

Dated at Washington, D.C. on November 21, 2007.

Gregory Z. Meyerson
Administrative Law Judge

[12] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, any party may file with the Board in Washington D.C. an original and eight copies of exceptions thereto, plus a supporting brief, if desired. Immediately upon filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.